

Expungement in Kentucky

A guide for legal practitioners

Expungement is the path to removal of old misdemeanors and Class D felonies from the records of Kentuckians, giving them access to jobs, housing, educational opportunities, and many other opportunities. If expungement is granted, the person “shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application.” KRS 431.073(6).

Table of Contents

EXPUNGEMENT OF CONVICTIONS	1
FELONY CONVICTIONS.....	1
<i>Enumerated Felonies.....</i>	<i>2</i>
<i>Enumerated Felonies Arising from a Single Incident.....</i>	<i>3</i>
<i>Class-D Felonies, Generally</i>	<i>5</i>
<i>Series of Class D-Felonies.....</i>	<i>7</i>
<i>Pardoned Felonies of All Classes</i>	<i>11</i>
<i>Impact of Expungement of Class D Felonies and Pardons</i>	<i>11</i>
<i>Alternate Paths to a Removing Felonies from a Records</i>	<i>12</i>
MISDEMEANOR CONVICTIONS	12
<i>Requirements for Misdemeanor Expungement</i>	<i>12</i>
<i>Sexual Based Offenses & Offenses Against Children.....</i>	<i>13</i>
<i>Enhancement Periods have Concluded</i>	<i>13</i>
VIOLATIONS	13
NON-CONVICTIONS	14
ACQUITTALS.....	14
DISMISSED CHARGES.....	15
<i>Dismissal With Prejudice.....</i>	<i>15</i>
<i>Dismissal Without Prejudice</i>	<i>16</i>
<i>Failure to Indict</i>	<i>16</i>
AGENCIES AND ENTITIES TO EXPUNGE RECORDS.....	17
<i>Lower Court and Law Enforcement.....</i>	<i>17</i>
<i>The Appellate Courts.....</i>	<i>18</i>
FEES ASSOCIATED WITH EXPUNGEMENT	18
MISDEMEANOR EXPUNGEMENT FEES.....	18
FELONY EXPUNGEMENT FEES.....	18
ACQUITTAL, DISMISSAL & FAILURE TO INDICT FEES.....	19
WAIVER OF FEES FOR INDIGENT PERSONS	19
THE EXPUNGEMENT PROCESS.....	20

CERTIFICATE OF ELIGIBILITY	20
NEEDED ADMINISTRATIVE OFFICE OF THE COURTS (AOC) FORMS	20
FILING THE PETITION FOR EXPUNGEMENT	21
A HEARING ON PETITION FOR EXPUNGEMENT.....	21
<i>Misdemeanors</i>	21
<i>Felonies</i>	21
<i>Dismissal, Acquittal, & Failure to Indict</i>	22
STATUTES RELATED TO EXPUNGEMENT	23
KRS 431.073: FELONY CONVICTIONS	23
KRS 431.076: ACQUITTALS, DISMISSALS & FAILURE TO INDICT	23
KRS 431.078: MISDEMEANOR, VIOLATION & TRAFFIC INFRACTIONS	23

Expungement of Convictions

Felony Convictions

Class-D felony expungement first became available in Kentucky in 2017. At that time, only a specific list of Class-D felonies were eligible for expungement. In 2019, Class-D felony expungement was expanded to include nearly all Class-D felonies. The law also allowed for a second expungement of a felony, if a person had already received an expungement prior to the 2019 law. The expungement of Class-C, Class-B, and Class-A felonies and capital offenses are only available following a pardon. The baseline requirements for felony expungement pursuant to KRS 431.073 are:

1. **No prior Class-D felony expungement, after June 27, 2019.** KRS 431.073(5)(a)
2. **No criminal charges currently pending.** KRS 431.073(5)(c)
3. **5-years from completion of the sentence** related to the charge the party is seeking to expunge. KRS 431.073(2). Completion of a sentence is when all conditions have been met, including fines.
4. **No misdemeanor or felony convictions in the 5-years prior to filing a petition for expungement.** KRS 431.073(5)(b). Violations, traffic infractions, or non-convictions do not serve as a bar to expungement.
5. **Eligible Class-D felony** which is not listed as specifically excluded. KRS 431.073(1)(d)

Please note that additional requirements are in place for those seeking expungement under KRS 431.073(1)(d). These requirements are described in full, below.

With the expansion of access to Class D felony expungement came additional proof requirements, which fall on the person seeking expungement. Class-D felony expungement now falls into 5 categories:

1. Enumerated felonies in KRS 431.073(1)(a).
2. "Series" of enumerated felonies arising from a "single incident." KRS 431.073(1)(a).
3. Class-D felonies generally, with specifically excluded offenses. KRS 431.073(1)(d).
4. "Series" of Class-D felonies. KRS 431.073(1)(d)
5. Pardoned felonies. KRS 431.073(1)(c).

Each of these categories are treated slightly differently under the law. For expungement of a single Class-D felony, the analysis of which category is best for the impacted person is relatively straightforward. When seeking expungement of more than one felony, the decision becomes more complex. Practitioners should also consider alternatives to expungement, such as Void and Seal, when assisting impacted persons to remove felonies from their records.

Felony expungement is prohibited for Class C, B, and A felonies and for capital offenses. The general rule is that expungement is limited to one felony per impacted person. There are exceptions to the 1-felony rule, as explained below.

Felony expungement is always discretionary. KRS 431.073(5). If expungement is granted, and the judgement is vacated “the court shall dismiss with prejudice any charges which are eligible for expungement ... upon full payment of the fee.” KRS 431.073(5). “[A]ll records in the custody of the court and any records in the custody of any other agency or official, including law enforcement” shall be expunged. Practitioners should be aware that pursuant to KRS 431.076(4), the Department for Community Based Services (commonly referred to as the Cabinet for Health & Family Services) is exempt from expunging records related to acquittals and dismissals. This language is not included in the statute for felony expungement, be aware that KRS 431.076(4) may cause issues when seeking expungement of felony records in the possession of the Department for Community Based Services.

Enumerated Felonies

Expungement for a single felony which is specifically listed in KRS 431.073(1)(a) are presumptively eligible for 1-time Class-D felony expungement. These felonies are listed within the statute and also outlined fully in the “Expungement Guidebook” which is included in these materials. All general conditions for Class-D felony expungement must be met.

Process for Seeking Expungement of an Enumerated Single Felony

To apply for 1-time Class-D felony expungement of a felony listed in KRS 431.073(1)(a) the petitioner must first seek a Certificate of Eligibility from the Records Division of the Kentucky State Police. Upon receipt of the Certificate of Eligibility, within 30-days, file in the county and court of conviction:

1. The Certificate of Eligibility
2. Completed AOC Form AOC-496.3
3. Filing fee of \$50

When completing AOC-496.3, be sure to include all agencies which may have a record of the conviction listed in the petition for expungement. Always include the Kentucky State Police, Records Division, as the Kentucky State Police maintain a record of every arrest in Kentucky. The Kentucky State Police, Records Division, is also tasked with expunging convictions from the Federal database. If you do not include the Kentucky State Police, Records Division, a conviction will remain in the Kentucky and Federal databases, despite an Order Granting Expungement. Other agencies to consider: Administrative Office of the Courts, county police, city police, detention center that held the petitioner, Department of Corrections, Probation & Parole, any pretrial monitoring services utilized.

“Upon payment of the filing fee and filing of the application, the Circuit Court Clerk shall serve a notice of filing” upon the Commonwealth’s attorney that prosecuted the case. KRS 431.073(2)(b). The prosecutor then has 60-days to respond, or longer if good cause is shown. KRS 431.073(2)(b). Even if an extension is granted for the Commonwealth’s response, a hearing “shall occur no later than one hundred twenty (120) days following the filing of the application. KRS 431.073(2)(b). A hearing cannot be held prior to the Commonwealth’s filing of a response or 120-days, whichever occurs later. KRS 431.073(3). A hearing is not required under this section. “If one hundred twenty (120) days have elapsed since the filing of the application and no response has been received from the victim or the office of the Commonwealth’s attorney ... the court may without a hearing, vacate the judgment. KRS 431.073(6). If a hearing is set, the Clerk shall notify the Commonwealth of the hearing and the Commonwealth shall notify the “victim of the crime, if there is an identified victim.” KRS 431.073(3).

Practitioners should be aware that the Commonwealth has the ability to “object that the application is grossly incomplete.” KRS 431.073(2)(c). If the prosecutor objects in this manner, “the court shall order the person or agency originating the application to supplement the application.” KRS 431.073(2)(c). The language of the statute is concerning because it does not seem to require the Commonwealth to state the grounds for objecting on the ground that an application is “grossly incomplete” yet required the Court to return the petition for additional information. If this occurs, attempt to learn the reasoning for the objection so the petitioner is not delayed for significant periods of time.

Be mindful that if an application for expungement is submitted pursuant to KRS 431.073, this will be the one felony expungement that the impacted person is entitled to in their lifetime (under current law). When assisting persons with more than one felony conviction on their record, practitioners should look for strategic ways to remove as many convictions from a record as possible or the most serious offenses. Practitioners should consider the following:

1. Expungement of multiple enumerated Class-D felonies which arise from a “single incident.”
2. Expungement of multiple Class-D felonies which constitute a “series.”
3. Use of Void and Seal

Enumerated Felonies Arising from a Single Incident

Expungement for a “series” of enumerated felonies which “arise from a single incident” can be sought pursuant to KRS 431.073(1)(b). The enumerated felonies are listed in 431.073(1)(a) and can be found in the “Expungement Guidebook” which is included in these materials. This is an exception to the 1-felony per person general rule. All general conditions for Class-D felony expungement must also be met.

Practitioners should first evaluate “series” of enumerated Class-D felonies to determine if they will reasonably qualify as a “single incident.” The caselaw in this area has not been favorable to those seeking expungement of a series of enumerated felonies. The Kentucky Supreme Court held that in order for Class-D felonies to be a “series” which arise from a “single incident,” it must be shown that the felonies were “performed in the furtherance of an individual criminal episode” and that the felonies were “closely compressed in terms of time.” Adams v. Commonwealth, 599 S.W.3d 752, 756 (Ky. 2019)(denial of expungement of role in cattle theft which arose over a period of time). In reversing the lower court’s granting of his petition for expungement, the Kentucky Supreme Court emphasized that between each cattle theft “Adams had more than a sufficient amount of time to disassociate himself from the criminal

act ... formed a new criminal intent and completed a separate and distinct theft.” Adams v. Commonwealth, 599 S.W.3d 752, 756 (Ky. 2019).

The Kentucky Supreme Court ruling in Adams mirrored previous opinions from the Kentucky Court of Appeals. In Commonwealth v. Ford, 543 S.W.3d 579, 581 (Ky. Ct. App. 2018), the Kentucky Court of Appeals held that “[p]assing bad checks on four different days at three different institutions over a ten-day period simply does not constitute a “single incident,” despite the fact that all forgeries were contained in a single indictment and resolved as a single case. Id. In Commonwealth v. Vowels, No. 2016-CA-001629-MR, 2018 WL 4044146, at *1 (Ky. Ct. App. Aug. 24, 2018)(unpublished), the Kentucky Court of Appeals determined that two (2) counts of Burglary and three (3) counts of Theft by Unlawful Taking related to car thefts in 1978 did not constitute a “single incident.” The court held that while the crimes “are related inasmuch as they are similar in nature, and they occurred within a relatively brief period” they did not “appear to arise from a single incident” because “[e]ach crime was discrete, and following each crime, Vowels had ample time to reflect of his past conduct, and to disassociate himself from further criminal activity Id. At 4.

When determining whether expungement under this section is appropriate, also consider whether the better route would be to seek expungement of a “series” of felonies under KRS 431.073(1)(d). While there are additional evidentiary requirements under KRS 431.073(1)(d), it may be a more favorable path to relief for some clients, especially in light of caselaw limiting the use of “series” which arise from a “single incident.” Please see “Series of Class-D Felonies” for more information.

Be mindful that if an application for expungement is submitted pursuant to KRS 431.073, this will be the one felony expungement that the impacted person is entitled to in their lifetime (under current law). When assisting persons with more than one felony conviction on their record, practitioners should look for strategic ways to remove as many convictions from a record as possible or the most serious offenses. Practitioners should consider the following:

1. Expungement of multiple Class-D felonies which constitute a “series.”
2. Use of Void and Seal

Process for Seeking Expungement of an Enumerated Single Felony

To apply for expungement of a “series” of Class-D felonies the petitioner must first seek a Certificate of Eligibility from the Records Division of the Kentucky State Police. Be aware that the Certificate of Eligibility will reflect the determination by the Kentucky State Police, Records Division, regarding whether the petitioner is eligible for expungement of each individual felony. Please remember that the Kentucky State Records Division is not make the final determination of expungement eligibility. If you feel the determination is an error, you may still file a petition for expungement and put eligibility arguments before the Court.

Upon receipt of the Certificate of Eligibility, within 30-days, file in the county and court of conviction:

1. The Certificate of Eligibility
2. Completed AOC Form AOC-496.3
3. Filing fee of \$50

When completing AOC-496.3, be sure to include all agencies which may have a record of the conviction listed in the petition for expungement. Always include the Kentucky State Police, Records Division, as the Kentucky State Police maintain a record of every arrest in Kentucky. The Kentucky State Police, Records Division, is also tasked with expunging convictions from the Federal database. If you do not include the Kentucky State Police, Records Division, a conviction will remain in the Kentucky and Federal databases, despite an Order Granting Expungement. Other agencies to consider: county police, city police, detention center that held the petitioner, Department of Corrections, Probation & Parole, any pretrial monitoring services utilized.

“Upon payment of the filing fee and filing of the application, the Circuit Court Clerk shall serve a notice of filing” upon the Commonwealth’s attorney that prosecuted the case. KRS 431.073(2)(b). The prosecutor then has 60-days to respond, or longer if good cause is shown. KRS 431.073(2)(b). Even if an extension is granted for the Commonwealth’s response, a hearing “shall occur no later than one hundred twenty (120) days following the filing of the application. KRS 431.073(2)(b). A hearing cannot be held prior to the Commonwealth’s filing of a response or 120-days, whichever occurs later. KRS 431.073(3). However, a hearing is not mandatory. “If one hundred twenty (120) days have elapsed since the filing of the application and no response has been received from the victim or the office of the Commonwealth’s attorney ... the court may without a hearing, vacate the judgment. KRS 431.073(6). If a hearing is set, the Clerk shall notify the Commonwealth of the hearing and the Commonwealth shall notify the “victim of the crime, if there is an identified victim.” KRS 431.073(3).

Practitioners should be aware that the Commonwealth has the ability to “object that the application is grossly incomplete.” KRS 431.073(2)(c). If the prosecutor objects in this manner, “the court shall order the person or agency originating the application to supplement the application.” KRS 431.073(2)(c). The language of the statute is concerning because it does not seem to require the Commonwealth to state the grounds for objecting on the ground that an application is “grossly incomplete” yet required the Court to return the petition for additional information. If this occurs, attempt to learn the reasoning for the objection so the petitioner is not delayed for significant periods of time.

Class-D Felonies, Generally

As of July 2019, Class-D felony expungement was expanded to include access to expungement for Class-D felonies “or an offense prior to January 1, 1975 which was punishable by not more than five (5) years’ incarceration”, unless specifically listed as ineligible. KRS 431.073(1)(d). Persons are entitled to expungement under this section if they have not received a Class-D felony expungement under paragraph (1)(d) (i.e. prior to July 15, 2020). KRS 431.073(1)(d). This means that if a person previously received an expungement, they are entitled to a second expungement under KRS 431.073(1)(d). All other conditions for Class-D felony expungement must be met.

The following convictions remain ineligible for expungement pursuant to KRS 431.073(1)(d):

1. Driving under the Influence, pursuant to KRS 189A.010;
2. Assault 4, Domestic Violence, pursuant to KRS 508.032;
3. Impersonating a Peace Officer, pursuant to KRS 519.055;
4. Abuse of a Public Office;
5. A Sexual Based Offense;

6. An Offense Against a Child; and
7. Convictions which resulted in serious bodily injury or death.

Expungements sought pursuant to KRS 431.073(1)(d) as subject to enhanced proof at the hearing on the petition for expungement. KRS 431.073(4)(a). "Upon payment of the filing fee and filing of the application, the Circuit Court Clerk shall serve a notice of filing" upon the Commonwealth's attorney that prosecuted the case. KRS 431.073(2)(b). The prosecutor then has 60-days to respond, or longer if good cause is shown. KRS 431.073(2)(b). Even if an extension is granted for the Commonwealth's response, a hearing "shall occur no later than one hundred twenty (120) days following the filing of the application. KRS 431.073(2)(b). "The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified." KRS 431.073(4)(a).

At the required hearing, the petitioner or their attorney must be present. The petitioner must prove by clear and convincing evidence, the following:

1. Vacating the judgment and expunging the record is consistent with the welfare and safety of the public;
2. The action is supported by his or her behavior since the conviction or convictions, as evidenced that he or she has been active in rehabilitative activities in prison and is living a law-abiding life since release;
3. The vacation and expungement is warranted by the interests of justice; and
4. Any other matter deemed appropriate or necessary by the court to make a determination regarding the petition for expungement is met.

In furtherance of proving the above-elements, the petitioner may "testify as to the specific adverse consequences he or she may be subject to if the application is denied." KRS 431.073(4)(b). The Court is also permitted to "hear testimony of witnesses and other matter the court deems proper and relevant to its determination regarding the application" for expungement. KRS 431.073(4)(b). It is not clear how each of these elements will be interpreted by the Court. Practitioners are encouraged to take utilize public interest arguments related to how expungement is beneficial to the Commonwealth as a whole, as well as factors specific to your individual client. Practitioners are also encouraged to think creatively and include other materials such as letters of support, proof of employment and housing, or any other item which may be helpful to your client.

At the hearing, the Commonwealth may also present proof at the hearing "of any extraordinary circumstances that exist to deny the application." KRS 431.073(4)(b). "A victim of any offense listed in the application shall have an opportunity to be heard at any hearing held" under section (1)(d) related to expungement of Class-D felonies.

The Class-D felony is eligible for expungement if the Court finds that "circumstances warrant vacation and expungement," and that harm to the person seeking expungement "clearly outweighs the public interest in the criminal history record information being publically available." KRS 431.073(4)(c). However, be aware that the prosecutor's office is permitted to retain a "nonpublic record for law enforcement purposes only." KRS 431.073(4)(c). Practitioners are encouraged to request a specific order from the Court directing the prosecutor to maintain the expunged file in a location separate from other files, to protect the privacy of the petitioner and to avoid mistake in comingling of public and nonpublic files.

It is unclear whether felonies specifically enumerated in KRS 431.073 are eligible for expungement under KRS 431.073(1)(d), the Class-D felony expungement expansion section. For a single Class-D felony which

is specifically enumerated in the statute, it is unlikely that it will be the best strategic decision to pursue expungement pursuant to KRS 431.073(1)(d), due to the mandatory hearing and heightened burden on the petitioner. If you are seeking the expungement of more than one specifically enumerated Class-D felony, this analysis will likely change. For a full analysis for a single Class-D felony or series of Class-D felonies, please see the section on “Series of Class-D Felonies.”

Process for Seeking Expungement of a Class-D Felony

To apply for expungement of an eligible Class-D felony, the petitioner must first seek a Certificate of Eligibility from the Records Division of the Kentucky State Police. Be aware that the Certificate of Eligibility will reflect the determination by the Kentucky State Police, Records Division, regarding whether the petitioner is eligible for expungement of each individual felony. Please remember that the Kentucky State Records Division is not make the final determination of expungement eligibility. If you feel the determination is an error, you may still file a petition for expungement and put eligibility arguments before the Court.

Upon receipt of the Certificate of Eligibility, within 30-days, file in the county and court of conviction:

1. The Certificate of Eligibility
2. Completed AOC Form AOC-496.3
3. Filing fee of \$50

When completing AOC-496.3, be sure to include all agencies which may have a record of the conviction listed in the petition for expungement. Always include the Kentucky State Police, Records Division, as the Kentucky State Police maintain a record of every arrest in Kentucky. The Kentucky State Police, Records Division, is also tasked with expunging convictions from the Federal database. If you do not include the Kentucky State Police, Records Division, a conviction will remain in the Kentucky and Federal databases, despite an Order Granting Expungement. Other agencies to consider: Administrative Office of the Courts, county police, city police, detention center that held the petitioner, Department of Corrections, Probation & Parole, any pretrial monitoring services utilized.

“Upon payment of the filing fee and filing of the application, the Circuit Court Clerk shall serve a notice of filing” upon the Commonwealth’s attorney that prosecuted the case. KRS 431.073(2)(b). “The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified.” KRS 431.073(4)(a). A hearing “shall occur no later than one hundred twenty (120) days following the filing of the application. KRS 431.073(2)(b). This means that a hearing must be held on an application for expungement pursuant to KRS 341.073(1)(d).

At the required hearing, both the petitioner and the “victim” have a right to testify and additional evidence can be heard by the Court. KRS 431.073(4)(b). The Court must then determine if “circumstances warrant vacation and expungement,” and that harm to the person seeking expungement “clearly outweighs the public interest in the criminal history record information being publically available.” KRS 431.073(4)(c).

Series of Class D-Felonies

A person may petition for expungement of a “series of felony offenses” which are eligible under KRS 431.073(1)(d). To seek expungement of a “series” of Class-D felonies, a petitioner must meet all of the

requirements described in the section above titled “Class-D Felonies, Generally.” This means that a hearing is mandatory and all heightened evidentiary elements also apply. The petitioner must also prove that all felonies listed in the petition for expungement constitute a “series.” KRS 431.073(1)(d); KRS 431.073; KRS 431.073(2)(b); KRS 431.073(4)(b); KRS 431.073(4)(c).

There is no current caselaw related to KRS 431.073(1)(d) and the definition of “series” under that portion of the felony expungement statute. Instead, we must look to treatment of the term “series” as applied to KRS 431.073(1)(b). In Adams v. Commonwealth, 599 S.W.3d 752, 756 (Ky. 2019); the court held that Adams was convicted of “series of Class D felonies that did not arise out of the same incident” when reversing the lower court’s granting of a petition for expungement. As such, a single indictment containing four counts of theft by unlawful taking, which stemmed from the stealing of 34 cows over a period of six months does constitute a “series.” Id. at 754. While unpublished, Commonwealth v. Vowels, No. 2016-CA-001629-MR, 2018 WL 4044146, at *1 (Ky. Ct. App. Aug. 24, 2018)(unpublished), provides us with more guidance on the significance of “series” as it relates to “single incident.” Citing Spicer v. Commonwealth, 422 S.W.3d 26, 32-33 (Ky. 2014) the Court noted that Kentucky court have “consistently held that a ‘series of acts that are readily distinguishable is not a [single] course of conduct.” (quoting Hill v. Commonwealth, No. 2008-SC-00100-MR, 2009 WL 2706960 (Ky. Aug. 27, 2009)). In Vowels, the Court ultimately held that two (2) counts of Burglary and three (3) counts of Theft by Unlawful Taking related to car thefts that occurred over five (5) days in 1978 “might constitute a series” but “do not appear to arise from a single incident.” Commonwealth v. Vowels, No. 2016-CA-001629-MR, 2018 WL 4044146, at *4 (Ky. Ct. App. Aug. 24, 2018).

In Commonwealth v. Ford, 543 S.W.3d 576, the court held that felony offenses, committed on four different days, over a ten day period did not arise from a “single incident” within the meaning of the expungement statute. The Court did not address whether the offenses constituted a “series.” Id. What is clear from the holding in Ford is that the limitation of access to expungement of multiple Class-D felonies turned on the interpretation of “single incident.” Id. Ford also highlights the “the cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect.” Id. (citing MPM Fin. Grp., Inc. v. Morton, 289 S.W.3d 193, 197 (Ky. 2009). Further stating that, “[i]n interpreting a statute, “[w]e have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion.” Id. (citing Cosby v. Commonwealth, 147 S.W.3d 56, 59 (Ky. 2004) (quoting Bailey v. Reeves, 662 S.W.2d 832, 834 (Ky. 1984)). “[T]he plain meaning of the statutory language is presumed to be what the legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source.” Id. (citing Revenue Cabinet v. O’Daniel, 153 S.W.3d 815, 819 (Ky. 2005)). With the shift in 431.073(1)(b) to omitting the “single incident” requirement, any interpretation with a severe limitation on “series” would be absurd and contrary to the legislative intent.

Series of Enumerated Felonies under KRS 431.073(1)(d)

There are two paths to seeking the expungement of multiple Class-D enumerated felonies. The first is under KRS 431.073(1)(b), which requires a finding of a “series” of felonies which arise from a “single incident.” The second is pursuant to KRS 431.073.073(1)(d) which simply requires a “series” of felonies. In light of caselaw which severely limits situations in which a “single incident” will be found (See, Enumerated Felonies), it may be preferable to seek expungement of enumerated Class-D felonies under KRS 431.073(1)(d). Practitioners should balance the limiting language surrounding “single incident” and the

heightened evidentiary requirements for expungement under KRS 431.073(1)(d). (See, Class-D Felonies, Generally).

While the language of KRS 431.073(1)(d) seems to clearly provide for expungement of a “series” of all Class-D felonies, unless specifically prohibited, a lack of caselaw on the topic may prove challenging. The first hurdle is that the Certificate of Eligibility may list a “series” of enumerated felonies as “not eligible.” If this occurs, then a petition for expungement can still be filed but arguments outlining eligibility may be required. In this Lawyers’ Guide to Expungement, we will outline one potential argument that should consider when assisting an impacted person seeking expungement.

Analysis of the statutory history and relevant statutes and caselaw shows that KRS 431.073(1)(d) applies to all Class-D felonies (both enumerated and not), which are not otherwise prohibited. KRS 431.073 outlines 5 categories where a person is eligible for felony expungement:

1. Category 1 (enacted 2016): Enumerated Class-D felonies. KRS 431.073(1)(a).
2. Category 2 (enacted 2016): “Series” of enumerated Class-D felonies arising from a “single incident.” KRS 431.073(1)(b).
3. Category 3 (enacted 2016): Pardoned felonies (any class of felony). KRS 431.073(1)(c).
4. Category 4 (enacted 2019): Class-D felonies, not otherwise excluded. KRS 431.073(1)(d)
5. Category 5 (enacted 2019): Series of Class-D felonies, not otherwise excluded. 431.073(1)(d)

The crucial elements that distinguishes Category 4 and Category 5 are the mandatory hearing and heightened evidentiary elements placed on the petitioner. The additional hearing safeguards were applied to Category 4 and Category 5 allows for an expansion of expungement, but with safety of the public being fully considered. If a person is eligible for expungement under Category 1, 2, or 3, then they are not required to have the hearing required in KRS 431.073(4). However, if you wish to seek expungement of a “series of felony offenses,” (without the requirement of “single incident”) whether listed in (1)(a), or not, then the additional safeguards of KRS 431.073(4) are triggered.

The intent to make available the avenue of KRS 431.074(1)(d) to all Class-D felonies, not specifically excluded, is also reflected in AOC-4963, the form required for the petition for felony expungement. The categories for petitioning for Class-D felony expungement are as follows:

1. One of the eligible offenses listed in KRS 431.073(1)(a)
2. Series of felonies listed in KRS 431.073(1)(a) which arose from a “single incident”
3. Pardoned felony
4. Eligible offense under KRS 431.073 (additional requirements in hearing)
5. Series of eligible offenses under KRS 431.073(1)(d) (additional requirements in hearing)

Laws governing statutory interpretation also requires a 5-category interpretation. “In construing statutes, our goal, of course, is to give effect to the intent of the General Assembly. We derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. *Shawnee Telecom Resources, Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) (citing, *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky.2006)). The 2019 modifications to the felony expungement statute, KRS 431.073, seems to directly mirror barriers to expungement in the interpretation of “single incident.” See Commonwealth v. Ford, 543 S.W.3d 579, 581 (Ky. Ct. App. 2018); Adams v. Commonwealth, 599 S.W.3d 752, 756 (Ky. 2019); Commonwealth v.

Vowels, No. 2016-CA-001629-MR, 2018 WL 4044146, at *1 (Ky. Ct. App. Aug. 24, 2018)(unpublished). In an attempt to widen access to expungement, the legislature created a path to expungement with heightened requirements intended to protect the public and ensure a deserving recipient, and also reduce barriers to relief.

An interpretation of the expungement statute in the manner above is also a more logical interpretation of the intent of the General Assembly. The felonies enumerated in KRS 431.073(1)(a) were the felonies first made eligible for expungement by the General Assembly. It was argued that these were the “least bad” Class-D felonies and they should therefore be expungeable. In 2019, the list grew to include “worse” Class-D felonies, but with additional safeguards, under KRS 431.073(4). Within that newly created category, less restrictive language for multiple felonies was also added. Namely, “series of eligible offenses” was added, to open up access to multiple Class-D felony expungement, as “single incident” had resulted in very narrow applicability in statutory interpretation by the courts. The General Assembly was therefore intentionally widening access to multiple felony expungement, and it would be contrary to that intent to limit the expungement of the “least bad” Class-D felonies, while expanding access to expungement of the “worse” class-d felonies. To read the statute otherwise would result in an absurd result, and “[w]e ... presume that the General Assembly did not intend an absurd statute or an unconstitutional one. *Layne v. Newberg*, 841 S.W.2d 181 (Ky.1992).

The 5-category approach is also needed so that all portions of the statute are read in their entirety. This reading is also required based on laws surrounding statutory interpretation, as “[w]e presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes.” *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775 (Ky.2008); *Lewis v. Jackson Energy Cooperative Corporation*, 189 S.W.3d 87 (Ky.2005). The plain language of KRS 431.073(1)(d) does not exclude felonies enumerated in sub-section (1)(a). Indeed the language read as a whole is: “A person who has been ... Convicted of a Class-D felony ... which was not a violation of [specifically listed excluded Class-D felonies], or a series of felony offenses eligible under this paragraph ... may file ... and application to have the judgment vacated.” To remove enumerated felonies from eligibility would therefore be contrary to the plain meaning of the statute.

Process for Seeking Expungement of a Class-D Felony

To apply for expungement of a “series” of eligible Class-D felony, the petitioner must first seek a Certificate of Eligibility from the Records Division of the Kentucky State Police. Be aware that the Certificate of Eligibility will reflect the determination by the Kentucky State Police, Records Division, regarding whether the petitioner is eligible for expungement of each individual felony. Please remember that the Kentucky State Records Division is not make the final determination of expungement eligibility. If you feel the determination is an error, you may still file a petition for expungement and put eligibility arguments before the Court.

Upon receipt of the Certificate of Eligibility, within 30-days, file in the county and court of conviction:

1. The Certificate of Eligibility
2. Completed AOC Form AOC-496.3
3. Filing fee of \$50

When completing AOC-496.3, be sure to include all agencies which may have a record of the conviction listed in the petition for expungement. Always include the Kentucky State Police, Records Division, as the Kentucky State Police maintain a record of every arrest in Kentucky. The Kentucky State Police, Records Division, is also tasked with expunging convictions from the Federal database. If you do not include the Kentucky State Police, Records Division, a conviction will remain in the Kentucky and Federal databases, despite an Order Granting Expungement. Other agencies to consider: county police, city police, detention center that held the petitioner, Department of Corrections, Probation & Parole, any pretrial monitoring services utilized.

“Upon payment of the filing fee and filing of the application, the Circuit Court Clerk shall serve a notice of filing” upon the Commonwealth’s attorney that prosecuted the case. KRS 431.073(2)(b). “The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified.” KRS 431.073(4)(a). A hearing “shall occur no later than one hundred twenty (120) days following the filing of the application. KRS 431.073(2)(b). This means that a hearing must be held on an application for expungement pursuant to KRS 341.073(1)(d).

At the required hearing, both the petitioner and the “victim” have a right to testify and additional evidence can be heard by the Court. KRS 431.073(4)(b). The Court must then determine if “circumstances warrant vacation and expungement,” and that harm to the person seeking expungement “clearly outweighs the public interest in the criminal history record information being publically available.” KRS 431.073(4)(c).

Pardoned Felonies of All Classes

Expungement for a single fully pardoned offense is available pursuant to KRS 431.073(1)(c). It is unclear whether a person is entitled to expungement of more than one fully pardoned offense, but has been interpreted as limited to the expungement of a single pardoned offense. Expungement of a pardoned offense will also be considered the 1-time expungement is available to an individual. All of the other rules and requirements described in “Enumerated Felonies” apply.

Pardon applications are sent directly to the Governor’s office, along with a statement of the reasons for seeking relief and three letters of recommendation. Each completed application is sent to the prosecutor for recommendation. For more information on the pardon process, visit the Kentucky Governor’s official website.

Impact of Expungement of Class D Felonies and Pardons

Upon entry of an order vacating and expunging conviction and payment of all fees, the record shall be expunged. KRS 431.073(7). “The court and other agencies shall cause records to be deleted or removed from their computer systems so that the matter shall not appear on official state-performed background checks.” KRS 431.073(7). While proof of expungement is required under the statute, practitioners should also ensure that all involved-agencies provided such proof. Indeed “[t]he court and other agencies shall reply to any inquiry that no record exists on the matter.” KRS 431.073(7).

When advising clients on the impact of expungement, be sure to advise that they “shall not have to disclose the fact of the record or any matter relating thereto on any application for employment, credit, or other type of application.” KRS 431.073(7). Further, “[i]f the person is not prohibited from voting for

any other reason, the person's ability to vote shall be restored and the person may register to vote." KRS 431.073(7). Remind your clients that they must register to vote once the expungement is final.

It is important to remind persons on a payment plan that their expungement will not be final until the payment of all fees. KRS 431.073(7). This means that the conviction will continue to remain on their record and subject to viewing by members of the public. This also means that their right to vote will not be restored until payment is made in full.

Alternate Paths to a Removing Felonies from a Records

When examining the best path to a clean slate for each client, remember that alternatives to expungement may assist in the process. The primary form of relief that is often overlooked is the Void and Seal process contained in KRS 218A.275 for first time offense of Possession of a Controlled Substance. This avenue of relief is only available to those who have not previously been convicted of Possession of a Controlled Substance. KRS 218A.275(12). The Void and Seal process is available to a person only one time. KRS 218A.275(7).

Please note that the Void and Seal process is not a full expungement. "If the court voids a conviction ... the court shall order the sealing of all records in the custody of the court and any records in the custody of any other agency official, including law enforcement." KRS 218A.275(9). "After the sealing of the record, the proceedings in the matter shall not be used against [the person] except for the purposes of determining the person's eligibility to have [their] conviction voided" under the same statute. KRS 218A.275(10). However, inspection of the voided and sealed conviction is possible pursuant to a court order and KRS 27A.099. KRS 218A.275(11). In effect, the charge is undone and hidden, but it is not removed from a criminal history.

Because expungement is limited to a single felony or series of felonies, Void and Seal should be considered if a person seeking assistance has multiple felonies on their records with one of those felonies being a first time possession charge.

Misdemeanor Convictions

Under KRS 431.078, a person may apply to expunge an unlimited number of misdemeanors and may seek misdemeanor expungement an unlimited number of times. For a person with only a single misdemeanor or only one case with multiple misdemeanor convictions, expungement is mandatory. KRS 431.073(4). Expungement of multiple sets of misdemeanors is discretionary. KRS 431.073(5).

Requirements for Misdemeanor Expungement

Eligibility for misdemeanor expungement requires the following:

1. **No criminal charges currently pending.** KRS 431.073(4)(c); KRS 431.073(5)(c)
2. **5-years from completion of the sentence** related to the charge the party is seeking to expunge. KRS 431.073(2). Completion of a sentence is when all conditions have been met, including fines.
3. **No misdemeanor or felony convictions in the 5-years prior to filing a petition for expungement.** KRS 431.073(4)(b), KRS 431.073(5)(b). Violations, traffic infractions, or non-convictions do not serve as a bar to expungement.
4. **Sexual based offense and offenses against children are not expungeable.** KRS 431.073(4)(a), KRS 431.073(5)(a). These terms are not defined in the statute.

5. **All enhancement periods have concluded.** The offense may not have been subject to enhancement for a second or subsequent offense or the time for the enhancement has expired. KRS 431.073(4)(d), KRS 431.073(5)(d). Expungement will be impacted by changes in the law related to enhancement periods, an example is that when DUI enhancement was extended to 10-years, so was the required waiting time for expungement.

When granted for a single misdemeanor, and if granted for a series of misdemeanors, “the proceedings in the case shall be deemed never to have occurred.” KRS 431.078(6). It should be noted that misdemeanor expungement is retroactive for “persons convicted of a misdemeanor prior to July 14, 1992” if they were convicted prior to the “inception of the District Court” in their county. KRS 431.078(10). Additionally, any person denied expungement “prior to June 25, 2013, due to the presence of a traffic infraction” on their records “may file a new petition for expungement” under this statute. KRS 431.078(12).

Sexual Based Offenses & Offenses Against Children

“Sexual based offense” and “offense against a minor are not defined in the expungement statute.

“Sex offense” is not defined in the expungement statute. However, guidance is offered in the statute related to sexual offender registration statutes are contained in KRS 17.500-17.580. While practitioners may be confined by statutory definitions on this case, be aware that certain misdemeanor offenses have a statute title that appears to be a “sex offense” when the elements do not contain sexual elements.

When evaluating an “offense against a minor” practitioners are encouraged to look to the plain meaning of the offense. Miller v. Commonwealth, 2004 WL 315161 (Ky. App. 2004). Think creatively about how to best assist the client, and evaluate whether the offense can be interpreted as an offense against the morals and values of society, as opposed to a named complaining witness.

Enhancement Periods have Concluded

The offense may not have been subject to enhancement for a second or subsequent offense or the time for the enhancement has expired. KRS 431.073(4)(d), KRS 431.073(5)(d). Expungement will be impacted by changes in the law related to enhancement periods, an example is that when DUI enhancement was extended to 10-years, so was the required waiting time for expungement. Commonwealth v. Jackson, 529 S.W.3d 739 (Ky. 2017) (expungement 10-year look-back period, extended from 5-years, is applicable to those convicted under the 5-year look-back period).

Be aware of misdemeanor offenses which carry a lifetime enhancement such as:

- Trafficking
- Cultivation
- Unauthorized use of a Motor Vehicle

Violations

The process for expungement of violations is the same as that for misdemeanors. KRS 431.078(1)(a); See, “Requirements for Misdemeanor Expungement”. For the purpose of violation expungement, the term “violation” has the same meaning as in KRS 500.080.

Non-Convictions

KRS 431.076 sets forth the process for expungement of dismissals, acquittals and failure to indict. Acquittals are always entitled to automatic expungement after July 15, 2020, and presumptively expungeable 60-days after acquittal. Charges after failure to indict are also presumptively expungeable after 6-months of inaction. Dismissals with prejudice and dismissals without prejudice are treated differently under the statute, and outlined below. While dismissals with prejudice are automatically expunged after July 15, 2020 and presumptively expungeable, dismissals without prejudice are subject to waiting periods.

The impact of a completed expungement of an acquittal, dismissal, or failure to indict is tremendous on the life of an impacted person. “After the expungement, the proceedings in the matter shall be deemed never to have occurred. The court and other agencies shall delete or remove the records from their computer systems so that any official state-performed background check will indicate that the records do not exist.” KRS 431.076(6).

Acquittals

Automatic expungement is available for acquittals that were received on or after July 15, 2020. KRS 431.076(1)(a). Expungement for acquittals received prior to July 15, 2020 are also available, but will require additional steps to secure the expungement. The process for acquittals received prior to July 15, 2020 should be used for automatic expungement that is not received due to error. KRS 431.076(1)(b).

Automatic Expungement after Acquittal: “On or after July 15, 2020, if a court enters an order of acquittal of criminal charges against a person ... the court shall order the record expunged upon the expiration of thirty (30) days, unless the person objects to the expungement.” KRS 431.076(1)(a). This means that without action from the person who was acquitted of charges, the charges should be expunged. However, a practitioner should be prepared to remind the court that an expungement order should be entered, and also confirm that the expungement Order was entered and properly sent to KSP records and all other agencies in connection with the acquitted charges.

Request for Expungement after Acquittal:

Expungement following an acquittal is available to all persons, regardless of acquittal date. KRS 431.076(8) “A person who has been charged with a criminal offense and who has been acquitted of the charges ... and whose records have not been expunged pursuant to paragraph (a) of this subsection, may petition the court in which the disposition of the charges was made to expunge all charges.” KRS 431.076(1)(b). An expungement after acquittal shall not be filed prior to 60-days after acquittal. KRS 431.076(2)(a).

This portion of the statute should be used: 1) for acquittals prior to July 15, 2020; and 2) acquittals after July 15, 2020 where automatic expungement did not occur. Because this is a relatively new area of the law, practitioners should be diligent in confirming that expungement was properly processed by the Court and seek expungement where automatic legal operations did not occur. However, automatic expungement is the responsibility of the Court, pursuant to statute, and therefore should be referenced in any filing for expungement.

A certificate of eligibility is not needed when seeking expungement following acquittal. There is also no filing fee. To seek expungement following acquittal, file AOC form AOC-497.2 in the court of acquittal.

Dismissed Charges

Expungement of dismissed charges, both with and without prejudice, is available. KRS 431.076. Expungement is limited to charges which were not received “in exchange for a guilty plea to another charge.” KRS 431.076(1)(a).

Determining whether a conviction has been dismissed with or without prejudice can be difficult due to Courtnet entry style. If a determination whether a charge was dismissed with or without process cannot be made from Courtnet, it is suggested that a practitioner request the formal docket page or other documentation from the Court, including the video record. If it is still unclear whether a charge was dismissed with or without prejudice, a practitioner should determine whether the client is barred from expungement if without prejudice due to waiting periods. If so, a practitioner may seek agreement with the prosecution or a designation by the Court that the dismissal be noted with prejudice.

Practitioners should be aware that a trial court’s dismissal of an indictment, without consent of the Commonwealth, should be deemed “without prejudice” due to separation of powers concerns. Keeling v. Commonwealth, 381 S.W.3d 248, 258059 (Ky. 2012). Keeling overrules previous application of CR 41.02(3) to criminal proceedings by virtue of RCr 13.04. See, Commonwealth v. Hicks, 869 S.W.2d 35, 36 (Ky. 1994)(overruled by Keeling, *supra*). It should be noted that when written and oral statements regarding dismissal are inconsistent, the written statements “shall prevail and the [oral statements] shall be disregarded.” Hicks, *supra*.

Dismissal With Prejudice

Automatic expungement is available for charges that were dismissed with prejudice, where dismissal occurred on or after July 15, 2020 and were not in exchange for a guilty plea to another charge. KRS 431.076(8). KRS 431.076(1)(a). Expungement for dismissals with prejudice received prior to July 15, 2020 are also available, but will require additional steps to secure the expungement. The process for acquittals received prior to July 15, 2020 should be used for automatic expungement that is not received due to error. KRS 431.076(1)(b).

Automatic Expungement after Acquittal: “On or after July 15, 2020, if a court enters ... an order dismissing with prejudice all criminal charges in a case against a person and not in exchange for a guilty plea to another charge, the court shall order the record expunged upon the expiration of thirty (30) days, unless the person objects to the expungement.” KRS 431.076(1)(a). This means that without action from the impacted persons, charges resulting in a dismissal with prejudice should automatically receive expungement. However, a practitioner should be prepared to remind the court that an expungement order should be entered, and also confirm that the expungement Order was entered and properly sent to KSP records and all other agencies in connection with the acquitted charges.

It is important to note that criminal charges under KRS 431.076(1)(a) “shall not include traffic infractions not otherwise classified as a misdemeanor.”

Request for Expungement after Acquittal:

Expungement following a dismissal with prejudice is available to all persons, regardless of dismissal date. “A person ... against whom charges have been dismissed and not in exchange for a guilty plea to another charge, and whose records have not been expunged pursuant to paragraph (a) of this subsection, may petition the court in which the disposition of the charges was made to expunge all charges” KRS 431.076(1)(b). An expungement after acquittal shall not be filed prior to 60-days after acquittal. KRS 431.076(2)(a).

This portion of the statute should be used: 1) for dismissal with prejudice prior to July 15, 2020; and 2) dismissal with prejudice after July 15, 2020 where automatic expungement did not occur. Because this is a relatively new area of the law, practitioners should be diligent in confirming that expungement was properly processed by the Court and seek expungement where automatic legal operations did not occur. However, automatic expungement is the responsibility of the Court, pursuant to statute, and therefore should be referenced in any filing for expungement.

A certificate of eligibility is not needed when seeking expungement following acquittal. There is also no filing fee. To seek expungement following acquittal, file AOC form AOC-497.2 in the court of acquittal. If the Court finds that the petition is properly brought, “the court shall grant the petition and order the expunging of records.” KRS 431.076(3)(a).

Dismissal Without Prejudice

Expungement following a dismissal without prejudice is available to all persons, regardless of dismissal without prejudice date. KRS 431.076(1)(b); KRS 431.076(8). However, a waiting-period will apply to any dismissal without prejudice. The following waiting periods apply:

1. Felony charges dismissed without prejudice are eligible for expungement 3-years following “the date of the order of dismissal without prejudice.” KRS 431.076(2)(c)(1).
2. Misdemeanor charges dismissed without prejudice are eligible for expungement 1-year following “the date of the order of dismissal without prejudice.” KRS 431.076(2)(c)(2)

A certificate of eligibility is not needed when seeking expungement following acquittal. There is also no filing fee. To seek expungement following acquittal, file AOC form AOC-497.2 in the court where charges were dismissed without prejudice. “If the court finds the petition under (1)(b) of this section is properly brought, the court shall grant the petition and order the expunging of records.” KRS 431.076(3)(a).

Failure to Indict

Failure to indict occurs when a person is charged in District Court with a felony, and the case is then referred to the Grand Jury for indictment. Due to constraints of RCr 5.22 where a person shall be released from custody and bond conditions if not indicted within 60-days, cases are often resolved within that timeframe. In cases where an indictment is not received and information has not been filed by the Commonwealth’s attorney (also known as “direct indictment”) within 6-months, the impacted person is eligible for expungement of the pending charges. Practitioners should be aware that this does not prevent future indictment, but does remove the charge from the record of the impacted person.

KRS 431.076(1)(c) A person against whom felony charges originally filed in the District Court have not resulted in an indictment by the grand jury or in an information filed by the Commonwealth's attorney may petition the District Court in which the charges were filed to dismiss and expunge all charges for which an indictment or information has not issued. An expungement petition shall not be filed sooner than 6-months "following the date of the District Court decision to hold the matter to the grand jury". KRS 431.076(2)(b).

A certificate of eligibility is not needed when seeking expungement following failure to indict. There is also no filing fee. To seek expungement following acquittal, file AOC form AOC-497.2 in the court where there was no indictment for 6-months. The petition "shall be served upon the office of the county and Commonwealth's attorneys that prosecuted the case." KRS 431.076(3)(b). The prosecuting agency then has 90-days to file a response. KRS 431.076(3)(b)(2). If a response is not filed in 90-days, the court "shall dismiss the charges without prejudice and order the expunging of records" KRS 431.076(3)(b)(3). If a response is filed, "ninety (90) days after the date the response is filed, if an indictment has not been issued, the court shall dismiss without prejudice the charges for which an indictment has not issued and order the expunging of the records." KRS 431.076(3)(b)(4).

Agencies and Entities to Expunge Records

For expungement to be an effective tool for clients, we must ensure that all agencies retaining records related to our clients must be notified. Further, each entity must provide proof that records have been indeed expunged. A client will be deeply impacted if they report they have not been charged or convicted of an offense, and evidence of the charge is later discovered. The practitioner must work diligently to ensure that expungement is accomplished.

Practitioners should be aware that inspection of records is available after expungement but "only upon petition by the person who is the subject of the records and only to those persons named in the petition." KRS 431.076(7). This portion of the statute is essential because often the Records of the Kentucky State Police are not properly notified of expungement. Without ability to access these records after expungement could result in a disastrous result where expungement has been granted but a petitioner cannot prove expungement due to lack of access to necessary court records. This also highlights the need for practitioners to ensure that expungement orders notice all parties retaining records of conviction, including the Kentucky State Police, Records Division.

Lower Court and Law Enforcement

"An order of expungement pursuant to this section shall expunge all criminal records in the custody of the court and any criminal records in the custody of any other agency or official, including law enforcement records..." KRS 431.076(4). "Every agency, with records relating to the arrest, charge, or other matters arising out of the arrest or charge, that is ordered to expunge records, shall certify to the court within sixty (60) days of the entry of the expungement order, that the required expunging action has been completed. All orders enforcing the expungement procedure shall also be expunged." KRS 431.076(4).

It is important that practitioners research and be aware of all agencies involved in the charging of their client. This may include entities such as city or local police, probation and parole, pretrial services, the local or other regional jail. Be sure that each entity is included in the Order for expungement. Indeed, "[t]he court and other agencies shall reply to any inquiry that no record exists on the matter. The person

whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application.” KRS 431.076(6).

The only exception is that “no order no order of expungement pursuant to this section shall expunge records in the custody of the Department for Community Based Services.” KRS 431.076(4). The Department for Community Based Services is most commonly known as the Cabinet for Health and Family Services.

The Appellate Courts

Expungement of appellate records is also essential for a client to truly receive a fresh start. If a potential service provider, employer, or community member can simply search appellate court records and find evidence of a prior charge, the client may be greatly impacted. The statute allows for expungement of appellate court records for dismissed charges. This will not impact failure to indict as appellate action would not be appropriate on the pending charge.

Misdemeanor Expungement

“If an expungement is ordered under subsection (1)(a) or (b) of this section, an appellate court which issued an opinion in the case shall order the appellate case file to be sealed and also direct that the version of the appellate opinion published on the court’s Web site be modified to avoid use of the defendant’s name in the case title and body of the opinion.” KRS 431.076(5)(a).

Felony Expungement

Expungement does not, however, “nullify any findings of fact or conclusion of law made by the trial court or any appellate court.” KRS 431.073(8). Expungement also “shall not constitute a finding of innocence regarding the conviction.” KRS 431.073(8). Remember, the expungement process makes it as though the conviction never occurred, which is different than innocence, but still a distinction that we must remind those that we assist.

Fees Associated with Expungement

Misdemeanor Expungement Fees

The filing fee for a misdemeanor expungement is \$100. KRS 431.078(7). The first \$50 is non-refundable. KRS 431.078(7). If expungement is not granted, the petitioner can be reimbursed of the remaining \$50 of the fee.

Felony Expungement Fees

The total fee for felony expungement is \$300. KRS 431.073(10); KRS 431.073(11). The filing fee that must accompany the petition for expungement and certificate of eligibility is \$50. KRS 431.078(10). An additional \$250 is due “[u]pon issuance of an order vacating and expunging a conviction.” The expungement will not be final until full payment is received. KRS 431.073(5).

Payment plans are available to those unable to immediately pay \$250. KRS 431.073(11); KRS 543.020. If an installment payment plan is selected, the court must give the impacted person at least 18-months to pay, from the date of the order. KRS 431.073(11)(a). The Court must also provide information on total amount due, payment frequency, and due date for all payment. KRS 431.073(11)(b). The notice should also state that “expungement cannot be completed until full payment is received” and if that payment cannot be made in full the petitioner “shall appear on the date to show good cause” as to why payment has not been made. KRS 431.073(11)(b). It is very important to remember that “no applicant shall be ordered to jail for failure to complete an installment plan” when related to a petition for expungement. KRS 431.073(11)(b).

Acquittal, Dismissal & Failure to Indict Fees

There is no fee for expungement associated with acquittal, dismissal, and failure to indict. KRS 431.076. A Certificate of Eligibility is not required. The only required action is to file the appropriate AOC form (AOC-497.2) in the court of acquittal or dismissal without prejudice.

Automatic expungement of acquittals and dismissals with prejudice which take place on or after July 15, 2020, should occur without any action or payment of any fee or fine by the impacted person. KRS 431.076(1)(a). For acquittals and dismissals without prejudice prior to July 15, 2020, or if automatic expungement does not occur, the impacted person may file for expungement after 60-days. KRS 431.076(2)(a). For dismissals without prejudice of a misdemeanor the application can be made after 1-year, no filing fee is required. KRS 431.076(2)(c)(2). For dismissals without prejudice for a felony, the application can be made after 3-years, no filing fee is required. KRS 431.076(2)(c)(1). For failure to indict, the application can be made after 6-months, no filing fee is required. KRS 431.076(2)(b).

Waiver of Fees for Indigent Persons

The statute does not specifically state whether the fee is waivable. Practitioners working on behalf of indigent clients should seek waiver of fees with a motion to proceed *in forma pauperis*. See KRS 453.190 (“A court shall allow a poor person residing in this state to file or defend any action or appeal therein without paying costs.”); *Spees v. Kentucky Legal Aid*, 274 S.W.3d 447, 450 (Ky. 2009).

Practitioners should further be aware of *Jones v. Commonwealth*, No. 2019-CA-000172-MR, 2019 WL 5089922 (Ky. Ct. App. Oct. 11, 2019). *Jones* is not final and attorneys are currently seeking discretionary review by the Kentucky Supreme Court. In *Jones*, the Kentucky Court of Appeals held that the statute permitting individuals qualifying as “poor persons” to file or defend actions in state court without paying costs did not apply to expungement. *Id.* Keep your eye on this case as it may significantly impact access to expungement by indigent persons.

The fee associated with the Certificate of Eligibility, which is issued by the Kentucky State Police, Records Division, cannot be waived under any circumstance.

The Expungement Process

Certificate of Eligibility

Any person seeking expungement of a conviction must first request a Certificate of Eligibility.

A certificate of eligibility can be requested online. Instructions can be found at:

<https://kycourts.gov/Expungement/Pages/process.aspx>. The steps for requesting online:

1. Register at the registration site (requires an email) at the [registration site](#)
2. Complete the [online request form](#)
3. Submit a \$40 payment (American Express, Discover, MasterCard, Visa, or debit card)
4. Check your email for notifications when the certification packet is available online
5. Log on to the [registration site](#) to download the certification packet
6. File the certification documents and proper expungement petition with the Office of Circuit Court Clerk in the county where the original charge was filed.

A certificate of eligibility can also be requested by mail.

1. Download the [Expungement Certification Request Form](#)
2. Complete the form
3. Provide the \$40 payment by check or money order made payable to the Kentucky State Treasurer
4. Mail the completed form and payment to: Records Unit, Administrative Office of the Courts, 2002 Vandalay Drive, Frankfort, KY 40601
5. You will receive your certification packet by U.S. mail at the address you provided.

The Kentucky State Police, Records Division, who processes the Certificate of Eligibility recommends using the online processing portal over mail. If a Certificate of Eligibility is lost in the mail, another \$40 will have to be paid for a second Certificate of Eligibility. When using the online portal, be sure to check your email regularly as the Certificate of Eligibility is only valid for 30-days.

Needed Administrative Office of the Courts (AOC) Forms

For a conviction, once you have received your Certificate of Eligibility, you have 30-days to file your petition for expungement, filing fee, and proper AOC form. For dismissals, acquittals and failure to indict, you must use the proper AOC form, but a certificate of eligibility is not required.

- Felony expungement and Pardon Expungement: [AOC-496.3](#)
- Misdemeanor and Violation Expungement: [AOC-496.2](#)
- Acquittal, Dismissal and Failure to Indict Expungement: [AOC-497.2](#)

The form asks where the expungement request should be sent, upon a successful petition for expungement. Be exhaustive in the provided list and provide:

- Kentucky State Police, Records Division (**ALWAYS INCLUDE**)

- Administrative Office of the Courts [1001 Vandalay Dr, Frankfort, KY, 40601] **(ALWAYS INCLUDE)**
- City Police
- County Police
- Sheriff's Department
- Pretrial Services
- Kentucky Alternative Programs
- All federal Databases, including the Dept. of Homeland Security & Immigration (ICE) [500 12th St SW, Washington, DC, 20024]
- FBI database a.k.a NCIC [12401 Sycamore Station Place, Louisville, KY, 40299]
- Courtnet
- County Detention Center/Jail
- Cabinet for Health and Family Services [275 East Main St, Frankfort, KY, 40601]
- KY educational database [KY Department of Education, 300 Sower Blvd 5th Floor, Frankfort, KY, 40601]
- County or local Expungement & Information Processing Dept. (EIP)
- Department of Public Advocacy [5 Mill Creek Park, Frankfort, KY 40601]
- Any other agency which may hold records related to the arrest and/or conviction

Filing the Petition for Expungement

The petition for expungement must be filed in the county and court of conviction, acquittal, dismissal, or failure to indict. For expungement of a conviction, file the Certificate of Eligibility, with the proper AOC form, and the filing fee within 30-days of the issuance date of the Certificate of Eligibility. For a dismissal, acquittal, or failure to indict, simply file the appropriate AOC form.

A Hearing on Petition for Expungement

Misdemeanors

Upon the filing of a petition, the Court shall set a date for a hearing, no sooner than 30-days after the filing of the petition for a misdemeanor expungement. KRS 431.078(3). Parties that shall be notified are the County Attorney, "the victim of the crime," and "any other persons whom the person filing the petition has reason to believe may have relevant information related to the expungement of the record." KRS 431.078(3). Please note that "inability to locate the victim shall not delay the proceedings ... or preclude the holding of a hearing." KRS 431.078(3). At the conclusion of the hearing, if all requirements for misdemeanor expungement are met, the Court *may* order expungement. KRS 431.078(5).

In practice, it appears that a hearing may be waived if all parties agree to expungement without a hearing.

Felonies

Enumerated Class-D Felony Expungement (and "series" arising from a "single incident"):

"Upon payment of the filing fee and filing of the application, the Circuit Court Clerk shall serve a notice of filing" upon the Commonwealth's attorney that prosecuted the case. KRS 431.073(2)(b). The prosecutor then has 60-days to respond, or longer if good cause is shown. KRS 431.073(2)(b). Even if an extension is granted for the Commonwealth's response, a hearing "shall occur no later than one hundred twenty (120)

days following the filing of the application. KRS 431.073(2)(b). A hearing cannot be held prior to the Commonwealth's filing of a response or 120-days, whichever occurs later. KRS 431.073(3). However, a hearing is not mandatory. "If one hundred twenty (120) days have elapsed since the filing of the application and no response has been received from the victim or the office of the Commonwealth's attorney ... the court may without a hearing, vacate the judgment. KRS 431.073(6). If a hearing is set, the Clerk shall notify the Commonwealth of the hearing and the Commonwealth shall notify the "victim of the crime, if there is an identified victim." KRS 431.073(3).

Practitioners should be aware that the Commonwealth has the ability to "object that the application is grossly incomplete." KRS 431.073(2)(c). If the prosecutor objects in this manner, "the court shall order the person or agency originating the application to supplement the application." KRS 431.073(2)(c). The language of the statute is concerning because it does not seem to require the Commonwealth to state the grounds for objecting on the ground that an application is "grossly incomplete" yet required the Court to return the petition for additional information. If this occurs, attempt to learn the reasoning for the objection so the petitioner is not delayed for significant periods of time.

All Class-D Felony Expungement (and series of Class-D Felonies):

"Upon payment of the filing fee and filing of the application, the Circuit Court Clerk shall serve a notice of filing" upon the Commonwealth's attorney that prosecuted the case. KRS 431.073(2)(b). "The prosecutor shall specify in the objection the reasons for believing a denial of the application is justified." KRS 431.073(4)(a). A hearing "shall occur no later than one hundred twenty (120) days following the filing of the application. KRS 431.073(2)(b). This means that a hearing must be held on an application for expungement pursuant to KRS 341.073(1)(d).

At the required hearing, both the petitioner and the "victim" have a right to testify and additional evidence can be heard by the Court. KRS 431.073(4)(b). The Court must then determine if "circumstances warrant vacation and expungement," and that harm to the person seeking expungement "clearly outweighs the public interest in the criminal history record information being publically available." KRS 431.073(4)(c).

Dismissal, Acquittal, & Failure to Indict

A hearing is not required and should not be held on a properly filed petition for expungement on dismissal or acquittal. KRS 431.076(3)(a). The Court is mandated by statute to "grant the petition and order the expunging of records" where a petition is "properly brought." KRS 431.076(3)(a).

For petitions for expungement related to failure to indict, a hearing will not be held. However, "the petition shall be served upon" the County or Commonwealth's attorney. KRS 431.076(3)(b). The prosecution response shall be filed within 90-days of the filing of the petition for expungement. KRS 431.076(3)(b)(2). If a response is not filed in 90-days, the Court "shall dismiss the charges without prejudice and order the expunging of records." KRS 431.076(3)(b)(3). If a response is filed, 90-days after the date the response is filed, if an indictment has not been issued, the Court "shall dismiss without prejudice" and issue the order expunging. KRS 431.076(3)(b)(3).

Statutes Related to Expungement

KRS 431.073: Felony Convictions

Effective June 27, 2019, access to felony expungement was expanded within KRS 431.073 to allow for expungement of the majority of felony offenses in the Commonwealth. The statute also provides for the process in accessing felony expungement for both enumerated and non-enumerated felony convictions.

KRS 431.076: Acquittals, Dismissals & Failure to Indict

Effective July 15, 2020, KRS 431.076 provides automatic expungement for those who are acquitted of crimes and for those for whom charges have been dismissed without prejudice. KRS 431.076 also provides timeframes and procedures for expungement of felonies and misdemeanors that are dismissed without prejudice. This statute also provides for expungement of felony charges which have not resulted in an indictment or information filed by the Commonwealth's attorney.

KRS 431.078: Misdemeanor, Violation & Traffic Infractions

Effective July 15, 2016, KRS 431.078 overhauled the prior expungement process, allowing for far expanded access to misdemeanor expungement in the Commonwealth. The statute also sets forth requirements for misdemeanor expungement and the process of expungement of misdemeanor offenses.